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paragraph F.1. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

c. Whenever a litigation request or demand is made upon DoD personnel for official DoD information or for testimony concerning such information, the personnel upon whom the request or demand was made shall immediately notify the DoD official designated in paragraph F.1. for the Component to which the individual contacted is or, for former personnel, was last assigned. In appropriate cases, the responsible DoD official shall thereupon notify the Department of Justice of the request or demands. After due consultation and coordination with the Department of Justice, as required, the DoD official shall determine whether the individual is required to comply with the request or demand and shall notify the requestor or the court or other authority of the determination reached.

d. If, after DoD personnel have received a litigation request or demand and have in turn notified the appropriate DoD official in accordance with paragraph F.3.c., a response to the request or demand is required before instructions from the responsible official are received, the responsible official designated in paragraph F.1. shall furnish the requestor or the court or other authority with a copy of this Directive and applicable implementing regulations, inform the requestor or the court or other authority that the request or demand is being reviewed, and seek a stay of the request or demand pending a final determination by the Component concerned.

e. If a court of competent jurisdiction or other appropriate authority declines to stay the effect of the request or demand in response to action taken pursuant to paragraph F.3.d., or if such court or other authority orders that the request or demand must be complied with notwithstanding the final decision of the appropriate DoD official, the DoD personnel upon whom the request or demand was made shall notify the responsible DoD official of such ruling or order. If the DoD official determines that no further legal review of or challenge to the court's ruling or order will be sought, the affected DoD personnel shall comply with the request, demand, or order. If directed by the appropriate DoD official, however, the affected DoD personnel shall respectfully decline to comply with the demand. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

4. Fees

Consistent with the guidelines in DoD Instruction 7230.7 (reference (f)), the appropriate officials designated in paragraph F.1. are authorized to charge reasonable fees, as established by regulation and to the extent not prohibited by law, to parties seeking, by request or demand, official DoD information not otherwise available under the DoD Freedom of Information Act Program (reference

(g)). Such fees, in amounts calculated to reimburse the Government for the expense of providing such information, may include the costs of time expended by DoD employees to process and respond to the request or demand; attorney time for reviewing the request or demand and any information located in response thereto and for related legal work in connection with the request or demand; and expenses generated by materials and equipment used to search for, produce, and copy the responsive information. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978).

5. Expert or Opinion Testimony

DoD personnel shall not provide, with or without compensation, opinion or expert testimony concerning official DoD information, subjects, or activities, except on behalf of the United States or a party represented by the Department of Justice. Upon a showing by the requestor of exceptional need or unique circumstances and that the anticipated testimony will not be adverse to the interests of the Department of Defense or the United States, the appropriate DoD official designated in paragraph F.1. may, in writing, grant special authorization for DoD personnel to appear and testify at no expense to the United States. If, despite the final determination of the responsible DoD official, a court of competent jurisdiction, or other appropriate authority, orders the appearance and expert or opinion testimony of DoD personnel, the personnel shall notify the responsible DoD official of such order. If the DoD official determines that no further legal review of or challenge to the court's order will be sought, the affected DoD personnel shall comply with the order. If directed by the appropriate DoD official, however, the affected DoD personnel shall respectfully decline to comply with the demand. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

G. Effective Date and Implementation

This Directive is effective immediately. Forward two copies of implementing documents to the General Counsel, DoD, within 120 days.

Signed by William H. Taft, IV
Deputy Secretary of Defense.

APPENDIX D TO PART 516—DEPARTMENT OF DEFENSE DIRECTIVE 7050.5, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO PROCUREMENT ACTIVITIES

Department of Defense Directive

June 7, 1989, Number 7050.5, IG, DOD

Subject: Coordination of Remedies for Fraud and Corruption Related to Procurement Activities

References:

- (a) DoD Directive 7050.5, subject as above, June 28, 1985 (hereby canceled)
- (b) Public Law 97-291, "The Victim and Witness Protection Act of 1982," October 12, 1982
- (c) Defense FAR Supplement (DFARS), Subpart 4.6, "Contract Reporting"
- (d) DoD Instruction 4105.61, "DoD Procurement Coding Manual," May 4, 1973
- (e) DoD 4105.61-M, "Procurement Coding Manual" (Volume I), October 1988, authorized by DoD Instruction 4105.61 May 4, 1973

A. Reissuance and Purpose

This Directive reissues reference (a) to update policies, procedures, and responsibilities for the coordination of criminal, civil, administrative, and contractual remedies stemming from investigation of fraud or corruption related to procurement activities. More effective and timely communication of information developed during such investigations will enable the Department of Defense to take the most appropriate of the available measures.

B. Applicability

This Directive applies to the Office of the Secretary of Defense (OSD); the Inspector General, Department of Defense (IG, DoD); the Military Departments; the Defense Agencies; and the DoD Field Activities (hereafter referred to collectively as "DoD Components").

C. Definitions

1. *DoD Criminal Investigative Organizations.* Refers to the U.S. Army Criminal Investigation Command; the Naval Investigative Service Command; the U.S. Air Force Office of Special Investigations; and the Defense Criminal Investigative Service, Office of the IG, DoD (OIG, DoD).

2. *Significant.* Refers to all fraud cases involving an alleged loss of \$100,000, or more; all corruption cases related to procurement that involved bribery, gratuities, or conflicts of interest; and any investigation into defective products or product substitution in which a SERIOUS HAZARD to health, safety, or operational readiness is indicated, regardless of loss value.

D. Policy

It is DoD policy that:

1. Each of the DoD Components shall monitor, from its inception, all significant investigations of fraud or corruption related to procurement activities affecting its organizations, for the purpose of ensuring that all possible criminal, civil, administrative, and contractual remedies in such cases are identified to cognizant procurement and command officials and that appropriate remedies

are pursued expeditiously. This process shall include appropriate coordination with all other affected DoD Components.

2. All investigations of fraud or corruption related to procurement activities shall be reviewed to determine and implement the appropriate contractual and administrative actions that are necessary to recover funds lost through fraud or corruption and to ensure the integrity of DoD programs and operations.

3. Appropriate civil, contractual, and administrative actions, including those set forth in enclosure 1, shall be taken expeditiously. During an investigation and before prosecution or litigation, and when based in whole or in part on evidence developed during an investigation, such actions shall be taken with the advance knowledge of the responsible DoD criminal investigative organization and, when necessary, the appropriate legal counsel in the Department of Defense and the Department of Justice (DoJ). When appropriate, such actions shall be taken before final resolution of the criminal or civil case.

E. Responsibilities

1. The *Heads of DoD Components* shall:

a. Establish a centralized organization (hereafter referred to as "the centralized organization") to monitor and ensure the coordination of criminal, civil, administrative, and contractual remedies for each significant investigation of fraud or corruption related to procurement activities affecting the DoD Component.

b. Establish procedures requiring the centralized organization to discuss regularly with the assigned DoD criminal investigative organization(s) such issues as the current status of significant investigations and their coordination with prosecutive authorities.

c. Establish procedures requiring that all coordination involving the DoJ, during the pendency of a criminal investigation, is accomplished by or with the advance knowledge of the appropriate DoD criminal investigative organization(s).

d. Establish procedures to ensure appropriate coordination of actions between the centralized organizations of any DoD Components affected by a significant investigation of fraud or corruption related to procurement activities.

e. Establish procedures to ensure that all proper and effective civil, administrative, and contractual remedies available to the Department of Defense are, when found applicable and appropriate, considered and undertaken promptly by the necessary DoD officials (e.g., commanders, programs officials, and contracting officers). This includes initiation of any suspension and debarment action within 30 days of an indictment or conviction. The centralized organization shall

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ensure that all proposed actions are coordinated with appropriate investigative organization.

f. Establish procedures to ensure that a specific comprehensive remedies plan is developed for each significant investigation involving fraud or corruption related to procurement activities. These procedures shall include the participation of the appropriate DoD criminal investigative organization in the development of the plan.

g. Establish procedures to ensure that in those significant investigations of fraud or corruption related to procurement activities when adverse impact on a DoD mission can be determined, such adverse impact is identified and documented by the centralized organization. This information is to be used by the centralized organization of the DoD Component concerned in development of the remedies plan required in paragraph E.1.f., above, and shall be furnished to prosecutors as stated in paragraph E.2.e., below. The information shall also be used by the centralized organizations in development and preparation of "Victim Impact Statements" for use in sentencing proceedings, as provided for P.L. 97-291 (reference (b)). Some examples of adverse impact on a DoD mission are as follows:

- (1) Endangerment of personnel or property.
- (2) Monetary loss.
- (3) Denigration of program or personnel integrity.
- (4) Compromise of the procurement process.

- (5) Reduction or loss of mission readiness.

h. Ensure training materials are developed on fraud and corruption in the procurement process, and that all procurement and procurement-related training includes a period of such instruction appropriate to the duration and nature of the training.

i. Establish procedures enabling the centralized organization to ensure that safety and readiness issues are examined and appropriately dealt with for all cases in which a notice is required under paragraph E.2.i., below. The minimum procedures to be followed by the centralized organization are in enclosure 3.

j. Ensure that appropriate command, procurement, and investigative organizations are provided sufficient information to determine if further inquiry is warranted on their part to prevent reoccurrence and detect other possible fraud within their activity.

2. The *Secretaries of the Military Departments* and the *Inspector General, Department of Defense (IG, DoD)*, or their designees, shall establish procedures that ensure that their respective criminal investigative organizations will:

a. Notify, in writing, the centralized organization for the affected DoD Component of the start of all significant investigations involving fraud or corruption that are related

to procurement activities. Initial notification shall include the following elements:

- (1) Case title.
- (2) Case control number.
- (3) Investigative agency and office of primary responsibility.
- (4) Date opened.
- (5) Predication.
- (6) Suspected offense(s).

b. Notify expeditiously the Defense Investigative Service (DIS) of any investigations that develop evidence that would impact on DoD-cleared industrial facilities or personnel.

c. Discuss regularly with the centralized organization such issues as the current status of significant investigations and their coordination with prosecutive authorities. If the DoD criminal investigative organization has prepared any documents summarizing the current status of the investigation, such documents shall be provided to the centralized organization. Completed reports of significant investigations also should be provided to the centralized organization.

d. Provide to the appropriate procurement officials, commanders, and suspension and debarment authorities, when needed to allow consideration of applicable remedies, any court records, documents, or other evidence of fraud or corruption related to procurement activities. Such information shall be provided in a timely manner to enable the suspension and debarment authority to initiate suspension and debarment action within 30 days of an indictment or conviction.

e. Provide expeditiously to prosecutive authorities the information regarding any adverse impact on a DoD mission, that is gathered under paragraph E.1.g., above, for the purpose of enhancing the prosecutability of a case. Such information also should be used in preparing a victim impact statement for use in sentencing proceedings as provided for in Public Law 97-291.

f. Gather, at the earliest practical point in the investigation, without reliance on grand jury subpoenas whenever possible, relevant information concerning responsible individuals, the organizational structure, finances, and contract history of DoD contractors under investigation for fraud or corruption related to procurement activities, to facilitate the criminal investigation as well as any civil, administrative, or contractual actions or remedies that may be taken. Some available sources of such information are listed in enclosure 2.

g. Provide timely notice to other cognizant DoD criminal investigative organizations of evidence of fraud by a contractor, subcontractor, or employees of either, on current or past contracts with, or affecting, other DoD Components.

h. Ascertain the impact upon any ongoing investigation or prosecution of civil, contractual, and administrative actions being

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considered and advise the appropriate centralized organization of any adverse impact.

i. Obtain a DD 350 report in every investigation into defective products or product substitution in which a SERIOUS HAZARD to health, safety, or operational readiness is indicated. Timely notification shall be made to the centralized organization of each DoD Component that is identified as having contract actions with the subject of the investigation.

j. Obtain a DD 350 report in all significant fraud investigations, as defined in subsection C.2. above, whether or not the case involved defective products or product substitution. Timely notification shall be made to the centralized organization of each DoD Component that is identified as having contract actions with the subject of the investigation.

3. The *Inspector General, Department of Defense* (IG, DoD), shall:

a. Develop training materials relating to fraud and corruption in procurement related activities which shall be utilized in all procurement related training in conjunction with training materials developed by the DoD Components. (See paragraph E.1.h., above.)

b. Establish procedures for providing to the DoD criminal investigative organizations, through the Office of the Assistant Inspector General for Auditing (OAIG-AUD), reports of data contained in the Individual Procurement Action Report (DD Form 350) System.

F. Procedures

Transmissions of information by DoD criminal investigative organizations required by subsection E.2., above, shall be made as expeditiously as possible, consistent with efforts not to compromise any ongoing criminal investigation. The transmission of the information may be delayed when, in the judgment of the head of the DoD criminal investigative organization, failure to delay would compromise the success of any investigation or prosecution. The prosecutive authorities dealing with the investigation shall be consulted, when appropriate, in making such determinations.

G. Effective Date and Implementation

This Directive is effective immediately. Forward two copies of implementing documents to the Inspector General, Department of Defense, within 120 days.

Donald J. Atwood,
Deputy Secretary of Defense.

Enclosures—3

1. Civil Contractual and Administrative Actions That Can Be Taken in Response to Evidence of Procurement Fraud

2. Sources of Information Relating to Government Contractors

32 CFR Ch. V (7–1–09 Edition)

3. Actions to be Taken in Product Substitution Investigations

Civil, Contractual, and Administrative Actions That Can Be Taken in Response to Evidence of Procurement Fraud

A. Civil

1. Statutory

- a. False Claims Act (31 USC 3729 *et seq.*).
- b. Anti-Kickback Act (41 USC 51 *et seq.*).
- c. Voiding Contracts (18 USC 218).
- d. Truth in Negotiations Act (10 USC 2306(f)).
- e. Fraudulent Claims-Contract Disputes Act (41 USC 604)

2. Nonstatutory

- a. Breach of contract.
- b. Breach of warranty.
- c. Money paid under mistake of fact.
- d. Unjust enrichment.
- e. Fraud and/or Deceit.
- f. Conversion.
- g. Rescission and/or Cancellation.
- h. Reformation.
- i. Enforcement of performance bond/guarantee agreement.

3. Contractual

- a. Termination of contract for default.
- b. Termination of contract for convenience of Government.
- c. Termination for default and exemplary damages under the gratuities clause.
- d. Rescission of contract.
- e. Contract warranties.
- f. Withholding of payments to contractor.
- g. Offset of payments due to contractor from other contracts.
- h. Price reduction.
- i. Correction of defects (or cost of correction).
- j. Refusal to accept nonconforming goods.
- k. Revocation of acceptance.
- l. Denial of claims submitted by contractors.
- m. Disallowance of contract costs.
- n. Removal of the contractor from automated solicitation or payment system.

4. Administrative

- a. Change in contracting forms and procedures.
- b. Removal or reassignment of Government personnel.
- c. Review of contract administration and payment controls.
- d. Revocation of warrant contracting officer.
- e. Suspension of contractor and contractor employees.
- f. Debarment of contractor and contractor employees.
- g. Revocation of facility security clearances.

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h. Nonaward of contract based upon a finding of contractor nonresponsibility.

i. Voluntary refunds.

SOURCES OF INFORMATION RELATING TO GOVERNMENT CONTRACTORS

Type of information	Possible source
Location, dollar value, type, and number of current contracts with the Department of Defense.	a. DD Form 350 Report. ¹ b. Defense Logistics Agency's (DLA) "Contract Administration Defense Logistics Agency's (DLA) Contract Administration Report (CAR Report) on contracts DLA administers.
2. Financial status of corporation, history of corporation, owners, and officers.	a. Dunn and Bradstreet Reports. b. Corporate filings with local secretaries of the State, or corporate recorders. c. Securities and Exchange Commission (public corporations). d. Small Business Administration (SBA) (small businesses). e. General Accounting Office (bid protests, and contractors indebted to the Government). f. Armed Services Board of Contract Appeals (ASBCA) or court litigation. g. List of Contractors Indebted to the United States (maintained, published and distributed by the U.S. Army Finance and Accounting Center, Indianapolis, Indiana 46249).
3. Security clearance background information on facility and officers.	a. Defense Investigative Service.
4. Performance history of contractor	a. Local contracting officers. b. Defense Contract Administration Service preaward surveys. c. SBA Certificate of Competency records. DLA Automated Criminal Case Management System. (Available through field offices of the DLA Counsel's office.) Field offices of the DLA Counsel's office.
5. Name, location, offense alleged, and previous investigative efforts involving DLA-awarded or DLA-administered contracts.	
6. Bid protests, litigation, and bankruptcy involving DLA-awarded or DLA-administered contracts.	

¹A determination as to the contract history of any DoD contractor with contracts in excess of \$25,000 annually can be made through a review of the "Individual Procurement Action Report" (DD Form 350) system, as prescribed by Subpart 4.6 of the DoD FAR Supplement, DoD Instruction 4105.61, and DoD 4105.61-M (references (c), (d), and (e)).

ACTIONS TO BE TAKEN IN PRODUCT SUBSTITUTION INVESTIGATIONS

A. The centralized organization, in all cases involving allegations of product substitution in which a **SERIOUS HAZARD** to health, safety, or operational readiness is indicated shall:

1. Review the notice of the case immediately after receiving it from the Defense criminal investigative organization. Review the notice to determine any potential safety or readiness issues indicated by the suspected fraud.

2. Notify all appropriate safety, procurement, and program officials of the existence of the case.

3. Obtain a complete assessment from safety, procurement, and program officials of the adverse impact of the fraud on DoD programs and operations.

4. Ensure that the DoD Component provides the Defense criminal investigative organization with full testing support to completely identify the defective nature of the substituted products. Costs associated with the testing shall be assumed by the appropriate procurement program.

5. Prepare a comprehensive impact statement describing the adverse impact of the fraud on DoD programs for use in any criminal, civil, or contractual action related to the case.

B. In all cases involving allegations of product substitution that affect more than one DoD Component, that centralized organizations of the affected DoD Components shall identify a lead Agency. The lead centralized organization shall ensure that information on the fraud is provided to the centralized organization of all other affected DoD Components. The lead centralized organization shall ensure compliance with the requirements of section A., above. The lead centralized organization shall then be responsible for preparing a comprehensive "Victim Impact Statement" as required by paragraph E.1.g. of this Directive.

C. In all cases involving allegations of product substitution, the Defense Criminal Investigative Organization shall:

1. Immediately notify the appropriate centralized organization of the beginning of the case.

2. Continue to provide to the centralized organization any information developed during the course of the investigation that indicates substituted products have been, or might be, provided to the Department of Defense.

3. Ensure that any request for testing of substituted products is provided to the centralized organization.